United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

NOS. 76-4087&74-2396

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UNITED STATES COURT of APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

THE GREASE COMPANY AND THEATRE NOW, INC.,

Respondent

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

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PETITION FOR REHEARING AND SUGGESTION FOR
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NATIONAL LABOR RELATIONS BOARD

Pursuant to Rules 40 and 35 of the Federal Rules of Appellate Procedure, the Board respectfully petitions this Court to grant rehearing, and suggests rehearing in banc, of the decision by a panel of this Court (Circuit Judges Gurfein and Meskill, District Judge Bartels) issued on March 30, 1977. The panel declined to enforce the Board's order on grounds that the Board's findings that respondents violated Section 8(a)(3) and (1) of the Act were not supported by substantial evidence. In

so deciding, the panel overruled the Administrative Law Judge's findings on the credibility of witnesses on the basis that it was "doubtful" or "improbable" that respondents would retaliate against "routine", "minor" union activities. As shown below, such hypothesis does not provide a valid basis for overturning credibility findings and disregards a long line of precedent in this Circuit.

1. This case turns on the respondent's motive for discharging employees Doucette Sr. and Doucette Jr. The Board affirmed the Administrative Law Judge's finding that the reason for the discharge of Doucette Sr. was his participation in the May 29-June 1 union grievance presentation concerning fellow employee Weeden and that Doucette Jr.'s discharge was linked with that of his father.[1/] These findings were based largely upon the Administrative Law Judge's resolution of the testimonial conflict as to "who decided on the discharges, when the discharge decision was reached, and why it was reached" (A. 29). Respondents' witnesses claimed that the decision was made by the producers Waissman and Fox, in April, for alleged defects in the Toronto run (A. 28-29, 31-33, 297-298). Doucette Sr. testified that General Manager Davis made the discharge decision, in June, and avowedly based it upon Doucette's participation in the Weeden grievance (A. 28, 22-24). The Administrative Law

1/ The case involves two hearings and two Board decisions since after the Board filed an application for enforcement in this Court, respondents moved the Court for leave to adduce additional evidence. The motion was granted; a second hearing was conducted; the Administrative Law Judge and the Board concluded that the additional evidence tended to corroborate, rather than refute the earlier conclusions.

Judge, observing that Doucette Sr.'s "demeanor on the witness stand impressed me much more favorably than Davis'" (A. 29) and that there were a number of discrepancies in respondents' version,[2/] resolved the conflict against the respondents (A. 29-33). Based on that credibility finding and on other evidentiary factors, the Judge, affirmed by the Board, concluded that the reasons advanced by respondents were pretextual and that the two employees were unlawfully discharged for their involvement in, or association with, protected union activity (A. 29-35, 45-46, 316-317).

2. In finding no substantial evidence to support the Board's unfair labor practice findings, the panel necessarily rejected the credited testimony of Doucette Sr. establishing Davis' hostility towards his involvement in the grievance activity as the moving factor behind the discharges. The only basis for this ruling appears in the panel's statement (slip opinion 2584-2585, n. 5):[3/]

2/ For example the Judge noted that, although respondents' witnesses testified that the Waissmans made the discharge decision between April 18 and April 23, Davis' pre-trial affidavit stated that he made the decision to discharge the Doucettes and did so in mid-May (A. 29-30). She also noted that respondents took no action against others who were equally blameworthy for the Toronto shortcomings, that Manager Antonelli did not learn of the discharge decision until it was announced on June 17, that Stage Manager Marino was surprised by the discharges, and that Davis made no attempt to obtain a replacement for Doucette until June 5 (A. 31-32, 308-309).

3/ The panel also characterized Doucette's testimony as an "uncorroborated report" of Davis' discharge statement (slip opinion p. 2584). However, the record shows that Doucette's account did find corroboration in Davis' admission that he telephoned Doucette after the first

(Continued)

> [i]n evaluating the record, we have considered the findings of the administrative law judge on the question of credibility. Nevertheless, it is doubtful that management in a highly organized industry would respond with hostility towards a shop steward carrying out routine union duties. Moreover, we note that the grievance proceeding itself demonstrated none of the anti-union animus now attributed to management.
>
> Similarly, Doucette's contract gave his employers the right to discharge him "without cause." It is highly improbable that an employer venal enough to fire two important workers for minor union activities in this industry would volunteer this information when no explanation was required. (emphasis supplied)

However, the issue of the respondents' reaction to Doucette's grievance activity is to be determined, not by assumptions as to "probable" managerial responses, but by the record evidence. The record here does not show that employers in a "highly organized" industry necessarily take a tolerant attitude towards union grievance activity, that respondents here took a benign view towards Doucette's grievance efforts, or that anyone viewed such grievance activity as "routine" or "minor". Indeed, there is ample evidence, credited by the Board, indicating that Davis was angered by Doucette's involvement in the Weeden grievance and discharged him along with Doucette Jr. for that conduct. The panel's speculations as to what "management in a highly organized industry" would

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3/ grievance session and asked why he was "getting involved in this" (A. 23; 180, 191). In any event, this Court has recognized that lack of corroboration is not sufficient to overturn credibility findings. N.L.R.B. v. Combined Century Theaters, Inc., 278 F. 2d 306, 308-309 (C.A. 2, 1960); N.L.R.B. v. Sandy Hill Iron & Brass Works, 165 F. 2d 660, 663 (C.A. 2, 1947).

or would not do provides no basis for overturning the credited evidence supporting the Board's findings.

3. The panel decision also ignores the important factor of demeanor which underlay the Administrative Law Judge's credibility findings (A. 6 n. 3, 15 n. 9, 29, 32). For more than three decades, this Court has consistently recognized and upheld the principle that resolutions of credibility by an Administrative Law Judge, who sees and hears the witnesses, should not be upset by a reviewing court, which cannot weigh conflicting testimony. N.L.R.B. v. Sartorius & Co., Inc., 140 F. 2d 203, 205 (1944); N.L.R.B. v. Columbia Products Corp., 141 F. 2d 687, 688 (1944); N.L.R.B. v. Century Projector Corp., 141 F. 2d 488, 489 (1944); N.L.R.B. v. Geraldine Novelty, 173 F. 2d 14, 18 (1949); N.L.R.B. v. Universal Camera Corp., 190 F. 2d 429, 430 (1951), on remand from the Supreme Court, 340 U.S. 474 (1949). Indeed, this principle was recently reaffirmed when the Court, quoting its earlier decision in N.L.R.B. v. Dinion Coil Co., 201 F. 2d 484, 490 (1952), stated

> [W]e surely may not upset the Board when it accepts a finding of an Examiner which is grounded upon (a) his disbelief in an orally testifying witness' demeanor or (b) the Examiner's evaluation of oral testimony as reliable, unless on its face it is hopelessly incredible or flatly contradicts either a so-called "law of nature" or undisputed documentary testimony.

N.L.R.B. v. Columbia University, 541 F. 2d 922, 920 (1976).[4/]

4/ The Court in remanding this case to the Board for additional proceedings accepted the Board's credibility findings and remanded on other grounds.

In the portion of the instant decision quoted above, the panel does not indicate any objective reason for its failure to accept the Board's credibility findings, nor does it imply that the Judge's evaluation here was "hopelessly incredible" in any way, or contradictory to either a "law of nature" or to undisputed documentary evidence. The panel merely expressed its "doubts" arising from the state of the industry and the "probability" of employer animus. Such reasoning is insufficient to overrule the Board's credibility findings, especially when this Court has so long endorsed the principle that its only duty is to see "whether there was any substantial evidence to support [the Board's] finding. Though it may strain our credulity, if it does not quite break it down, we must accept it . . . ." N.L.R.B. v. Columbia Products Corp., supra, 141 F. 2d at 687. (Emphasis supplied.)

WHEREFORE, the Board respectfully requests that the Court grant rehearing and suggests rehearing in banc, and that after such rehearing, a judgment be entered enforcing the Board's order in full.

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April 1977

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	)	
Respondents.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's Petition for Rehearing, etc. in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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Dated at Washington, D. C.

this 26th day of April, 1977